STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2007
v	No. 266089 Wayne Circuit Court
ASHLEY JORDAN PARKER, Defendant-Appellant.	LC No. 05-004785-01

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317,[1] three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the murder conviction, forty to sixty years' imprisonment for one assault conviction and 225 months to 40 years' imprisonment for the two other assault convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right, and we affirm.

On January 15, 2005, Lothario Triplett, his brother Christopher Burrows, and his girlfriend Janice Cusick, were in the living room of a house on Bentler Street in Detroit. Janice's 13-year-old daughter, Callie Cusick, was in a nearby bedroom. Janice and Triplett testified that defendant and a person whom they knew as defendant's cousin came to their house to buy marijuana. The two men had been to the house on previous occasions, so the witnesses were familiar with them. Triplett opened the front door for the two men, Triplett greeted defendant and reached for money in defendant's hand, and defendant shot him in the abdomen. Triplett testified that he did not actually see defendant shoot him, but the gunshot came from where defendant was standing.

After the gunshot, Triplett saw Janice run, heard defendant yell, "T - I," and heard a second shot. Janice testified that after the first gunshot, she saw defendant's cousin pull a gun from the sleeve of his jacket. She heard four additional shots as she sought cover. Triplett

[1] Defendant was charged with first-degree murder, MCL 750.316.

testified that as he fled, he was shot in the back. Triplett could see Callie hiding behind a couch in a bedroom closet. Callie testified that she heard four gunshots.

After the shooting, defendant and his cousin left the house. Burrows was subsequently found lying on the floor in the living room. He had been shot in his right leg and right arm, and subsequently died. According to the police testimony, two different weapons were fired during the incident. The physical evidence indicated that the bullet fragments removed from Triplett were from the same weapon that fired a bullet recovered from the living room, and that a bullet recovered from a hallway wall was fired from a different weapon. An officer testified that after the incident, defendant fled Michigan, and was subsequently arrested in Cleveland, Ohio.

At trial, defendant testified that he went to the Bentler house alone on January 15, 2005, but he did not have a gun, and did not shoot anyone. He testified that as he was walking toward the house, he saw a dark-colored car pull up with two people inside. One of the men went into the house, and defendant walked in immediately afterward. As defendant was preparing his money to buy marijuana, he heard a gunshot and ran out of the house.

Defendant first argues that there was insufficient evidence to sustain his convictions. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice,[2] and (4) without justification or excuse." *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001) (citation omitted). To prove an assault with intent to commit murder, the prosecution must establish beyond a reasonable doubt that the defendant committed (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

At trial, the prosecutor advanced the theory that defendant was guilty as a principal or an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. In order to support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the

[2] "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted).

commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001).

"'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *Carines, supra* at 758.

Viewed in a light most favorable to the prosecution, a rational trier of fact could find that defendant was either the principal or assisted in the commission of the crimes. Evidence showed that there were two shooters, and two different weapons fired during the incident. There was evidence that defendant and his cousin came to the Bentler house together. It was undisputed that Triplett and Janice were familiar with defendant and, thus, could easily identify him. In fact, defendant admitted that he was at the Bentler house at the time of the incident. Triplett testified that as he reached for money in defendant's hand, defendant, who was only an arm's length away, shot him in the abdomen. Although Triplett did not see defendant's gun, the gunshot came from where defendant was standing, and Triplett was certain that defendant was the person who shot him. Also, Janice saw defendant's cousin pull out his weapon *after* the first shot was fired. After defendant fired, Triplett heard him yell "T – I," and at least four additional shots were fired. Triplett was shot again in the back as he fled. Burrows was shot and killed in the living room during the shooting. The physical evidence indicated that the bullet fragments removed from Triplett were fired from the same weapon that fired a bullet recovered from the living room, and a bullet recovered from a hallway wall was fired from a different weapon. After the shooting, defendant and his cousin fled the Bentler house together.

Defendant argues that there was no evidence that "anyone was shooting to kill" Triplett or Burrows, thereby challenging the intent element of the crimes. An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Malice, which includes the intent to kill, may be inferred from facts in evidence, including the use of a deadly weapon. *Carines, supra* at 759. The evidence that loaded handguns were intentionally discharged toward the victims, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to reasonably infer that defendant possessed the required intent for second-degree murder and assault with intent to commit murder. *Id.*

Defendant also argues that the evidence was insufficient to sustain his convictions of assault with intent to kill Janice and Callie because there was no evidence that anyone intended to shoot them. We disagree. First, there was sufficient evidence from which the jury could have reasonably concluded that Janice was actually shot at. Second, under the doctrine of transferred intent, it is sufficient for the prosecution to show that defendant had the requisite state of mind to kill; "[t]he general intent to kill need not be directed at an identified individual or the eventual victim." *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003). While we might

agree with defendant's argument with respect to Callie had there not been evidence that bullets struck the closet in which she was hiding, we conclude that the facts here are similar to those in *Lawton*, *supra*, 196 Mich App at 350-351, and there was sufficient evidence to support the convictions under the doctrine of transferred intent as applied in *Lawton*.

We also reject defendant's claim that there was insufficient evidence that he possessed a firearm. The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a weapon may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). There was evidence that two different weapons were fired during the incident. Both Triplett and Janice identified defendant as one of the two shooters. Triplett testified that defendant fired the first shot, and he was certain that defendant shot him. Janice testified that defendant's cousin pulled out his weapon after the first shot had already been fired. This evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find that defendant possessed a firearm.

Defendant next argues that he is entitled to a new trial because the trial court failed to sufficiently instruct the jury on the specific intent necessary for conviction as an aider and abettor. We first note that although defendant objected to the court's instructions regarding aiding and abetting, he did not object specifically on the basis now asserted on appeal.[3] *Carines*, *supra* at 767. We find no plain error affecting defendant's substantial rights. The instructions as a whole were adequate to inform the jury of the required intent, and the issue for the jury was whether defendant had simply been in the wrong place at the wrong time, or whether he and his cousin were the shooters. There was no real question whether defendant's cousin had an intent that differed from defendant's. Consequently, reversal is not warranted on this basis.

In a supplemental brief filed in propria persona, defendant first contends that he was denied a fair trial by two instances of prosecutorial misconduct. We disagree. Because defendant failed to object to the prosecutor's conduct, we review this claim for plain error affecting substantial rights. *Carines*, *supra* at 763-765. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

We reject defendant's argument that the prosecutor impermissibly "introduced evidence never presented to the trier of fact" by questioning defendant about "another person named Dray." A prosecutor may question witnesses on those matters that were raised by the defense on direct examination. *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976). Here, the prosecutor's cross-examination of defendant was responsive to defendant's direct examination testimony that he did not know the individuals who defense counsel asked him about, including a

[3] Defendant objected only to the mere presence instruction, and expressed satisfaction with the

person named Dray. Further, a defendant cannot complain of testimony that he invited or instigated in an effort to support his defense. In other words, defendant "opened the door" to the challenged evidence. See generally, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Also, defendant's conclusory argument that the prosecutor "gained" the name Dray from "tape recordings" but "failed to lay a proper foundation for the recordings as evidence," is without merit. The prosecution did not present the tape recordings as evidence, or discuss the tape recordings during trial, so it was not required to lay a foundation to admit them. Further, defendant has not provided this Court with the tape recordings or provided any evidence that they contained exculpatory information. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Consequently, defendant is not entitled to relief on this basis.

We also reject defendant's argument that the prosecutor impermissibly mischaracterized the evidence during rebuttal argument by stating that Triplett was shot in the abdomen, although the medical records state that he was shot in the back. During trial, Triplett testified that he was first shot in the abdomen, and then shot in the back as he fled. The emergency medical records, which were introduced into evidence, stated that Triplett was shot in the back. During closing argument, defense counsel argued that, contrary to Triplett's testimony, the medical records showed that Triplett was shot twice in the back, and not in the abdomen. Viewed in context, the prosecutor's argument was not improper. Considering the conflicting evidence on this matter, the jury was aware that the parties disagreed on whether Triplett was shot in the abdomen. The prosecutor discussed the findings in the medical records and Triplett's testimony, urged the jurors to evaluate the evidence, and gave reasons why the jury should believe Triplett's testimony that he was shot in the abdomen. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). To the extent that the prosecutor's remarks could be considered improper, the trial court's instructions that the lawyers' comments are not evidence and that the jury was to decide the case on the basis of the properly admitted evidence were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, this unpreserved claim does not warrant reversal.

Defendant also argues that a new trial is required because defense counsel was ineffective for "failing to present a complete defense" by waiving the testimony of the medical record custodian. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Defendant argues that the testimony of the medical records custodian, who was endorsed as a prosecution witness but waived by defense counsel, would have shown that the medical records indicated that Triplett was shot twice in the back with exit wounds in the abdomen. Defendant claims that the testimony would have demonstrated that Triplett's testimony was false. But the medical records were admitted in evidence, and therefore were available to the jury during its deliberations and in assessing Triplett's testimony. To the extent defendant argues that counsel was ineffective in failing to call the emergency room doctor as a witness, we conclude that counsel was not ineffective in relying on the medical records.

There is no doubt that the jury was aware of the conflicting evidence on this point. Defense counsel argued that, contrary to Triplett's testimony, the medical records showed that Triplett was shot twice in the back. Moreover, given the testimony at trial, no reasonable likelihood exists that defendant would not have been convicted but for trial counsel's action. *Effinger*, *supra*. Therefore, defendant cannot establish a claim of ineffective assistance of counsel, and is not entitled to a new trial.

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White